Condea Vista Company, Lake Charles Chemical Complex *and* Paper, Allied-Industrial, Chemical, & Energy Workers International Union No. 4-555, AFL–CIO, CLC. Case 15–CA–15219

November 16, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On April 5, 2000, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions by way of a Motion for Clarification, to which Respondent filed an answer.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Condea Vista Chemical Company, Lake Charles, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with change of its policy of granting unlimited unpaid leave for certain employees to conduct union business off its plant premises.

(b) Discriminating against an employee in regard to its policy of unlimited unpaid leave to conduct union business off its plant premises because the employee has engaged in protected union activity and/or has filed unfair labor practice charges.

(c) Refusing to bargain collectively with the Paper, Allied Industrial, Chemical & Energy Workers International Union No. 4–555, as the exclusive collective-bargaining representative of the employees in the bargaining unit described below, regarding the policy of granting unlimited unpaid leave for certain employees to conduct union business off its plant premises:

> All employees of CONDEA Vista Company's Lake Charles East Plant, except and excluding all executives, division heads, office clerical employees, warehouse issuemen, chemists, engineers working in their professional capacity, safety supervisors, technicians, inspectors, fire marshals, salaried warehousemen, guards, and watchmen, professional employees, foreman [sic] and all other supervisor [sic] employees as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, reinstate its policy of granting unlimited unpaid leave to conduct union business off its plant premises.

(b) Within 14 days after service by the Region, post at its place of business in Lake Charles, Louisiana, copies of the attached notice marked "Appendix."[6] Copies of the

[1] The motion requested the Board to add a 8(a)(4) violation to the judge's conclusions of law. Since the motion conforms in all material respects with a timely filed exception, we have treated it as such.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also agree with the judge that the Respondent did not offer to bargain through its letter of October 30, 1998, or at a December 1998 meeting. *Ohio Power Co.*, 317 NLRB 135 (1995). We do not rely, however, on the judge's speculation that Darren Appleby, the union's representative at the December 1998 meeting, refused to discuss unpaid union leave for fear of a potential disciplinary inquiry.

[4] The judge found, based on the credited testimony of union international representative Gary Beevers, that Respondent's human resources director Michael Glackin told Beevers that unpaid leave for union-related business had been canceled because local union president Daren Appleby had been using this leave to prepare, inter alia, "frivolous complaints with the NLRB." In light of this finding, and in the absence of evidence of frivolous complaints, we conclude, in accord with the General Counsel's exception, that the Respondent's termination of unpaid leave for employees' off-premises union activity violated Sec. 8(a)(4), as well as 8(a)(5), (3), and (1). In so finding, we note that the complaint alleged that the Respondent's actions violated Sec. 8(a)(4) and that the allegation was fully litigated.

Member Hurtgen does not pass on the issue of whether the Respondent's termination of unpaid leave for off-premises union business was unlawful under Sec. 8(a)(5). He agrees that said termination was unlawful under Sec. 8(a)(3) and (4), and a Sec. 8(a)(5) conclusion would not materially alter the remedy.

[5] We shall modify the Order and substitute a new notice to include provisions addressing the discriminatory aspects of the Respondent's unlawful conduct and providing for the contingency of notice-mailing in the event that the Respondent ceases operations at its Lake Charles, Louisiana plant.

[6] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 1998.

(c) Within 21 days after service by the Region, filed with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with a change of our policy of granting unlimited unpaid leave to conduct union business away from our plant.

WE WILL NOT discriminate against an employee in regard to our policy of unlimited unpaid leave to conduct union business away from our plant because the employee has engaged in protected union activity and/or has filed unfair labor practice charges with the Board.

WE WILL NOT change our policy of granting unlimited unpaid leave to conduct union business away from our plant, without bargaining with Paper, Allied Industrial, Chemical & Energy Workers International Union, Local Union 4-555 as the exclusive collective-bargaining representative of the below described bargaining unit:

> All employees of CONDEA Vista Company's Lake Charles East Plant, except and excluding all executives, division heads, office clerical employees, warehouse issuemen, chemists, engineers working in their professional capacity, safety supervisors, technicians, inspectors, fire marshals, salaried warehousemen, guards, and watchmen, professional employees, foreman [sic] and all other supervisor [sic] employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of this Order, reinstate our former policy of granting unlimited unpaid leave to conduct union business away from the plant.

CONDEA VISTA CO., LAKE CHARLES CHEMICAL COMPLEX

Stacey M. Stein, Esq., for the General Counsel.
James P. Gillece, Jr., Esq. and *Robert R. Niccolini, Esq.,* of Baltimore, Maryland, for the Respondent.
Bernard L. Middleton, Esq., of Houston, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on January 26, 2000, in Lake Charles, Louisiana. The charge was filed on March 5, and a complaint issued on July 16, 1999.

Respondent, General Counsel, and Charging Party were represented.[1] In consideration of the entire record and briefs,[2] I make the following findings.

I. JURISDICTION

Respondent is in Westlake, Louisiana, where it is engaged in manufacturing and processing chemicals. During the 12 months ending May 31, 1999, its business included the purchase and receipt of goods valued in excess of $50,000 directly from points located outside Louisiana. Respondent has been an employer engaged in commerce within the meaning of section 2(2), (6), and (7) of the National Labor Relations Act (Act), at all material times.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Except as specifically noted herein the evidence is not in dispute. Respondent admitted, stipulated, or did not contest competent evidence, regarding matters including jurisdiction, labor organization, and supervisory status.

[2] Charging Party moved to strike Respondent's brief and Respondent responded to that motion. After full consideration Charging Party's motion is denied.

II. LABOR ORGANIZATIONS

Charging Party (Union) has been a labor organization within the meaning of Section 2(5) of the Act, at all material times.

III. UNFAIR LABOR PRACTICE ALLEGATIONS

At issue is an alleged unilateral change. The change dealt with Respondent's policy of permitting its employees in union office including its president and committeemen, to take unpaid leave to conduct union business outside the plant.

The Union represented the following described bargaining unit since about 1969:

> All employees of CONDEA Vista Company's Lake Charles East Plant, except and excluding all executives, division heads, office clerical employees, warehouse issuemen, chemists, engineers working in their professional capacity, safety supervisors, technicians, inspectors, fire marshals, salaried ware–housemen, guards and watchmen, professional employees, foreman [sic], and all other supervisor [sic] employees as defined in the Act.

The Union and Respondent were parties to several collective-bargaining agreements. The most recent is effective from August 21, 1996 to October 15, 2002.[3] There is nothing in that agreement regarding unpaid leave for union business outside the plant. The agreement does provide for paid leave for the handling of union business in the plant (JX 1, art. 22–24).[4]

Respondent permitted unpaid leave for union business outside the plant, before October 1998. Daren Appleby[5] testified that Respondent permitted him to take unlimited unpaid leave to conduct union business including processing grievances, arbitration, organizing, international union meetings, conventions, and processing unfair labor practice charges. Respondent did not require Appleby to inform it why he took unpaid union leave and Respondent placed no limitation on the amount of unpaid leave.[6] The Union reimbursed Appleby's loss of pay to conduct union business away from the plant.

Daren Appleby recalled that he needed two days of paid union leave to go through documents in a warehouse and human resources administrator Ely told him that Respondent was willing to pay for only 1/2 that time under article 22–24 of the collective-bargaining agreement. Appleby met with Ely in October and asked for cooperation in investigating problems that would require more on–site leave than normal. Appleby asked Ely for his thoughts on the meaning of article 22–24.

Jim Ely wrote Daren Appleby on October 30, 1998:

> You had a question recently about what the Company thought was reasonable Union business time as defined in Article 22–4.
>
> We took a look at the amount of time you have claimed as Union business for 1997 and 1998 to date and found that you have missed more than a third of your scheduled shifts, 54 so far in 1998.
>
> We also read Article 22–4 and were reminded that it has to do only with on–site Union business.
>
> . . . .
>
> Most of the time you have been on Union business has not been during your shift to investigate, present or process grievances on Company property. Most of your Union business days have been complete shifts that you spent off Company property.
>
> To answer your question, we know that 36 percent absence for off–property Union business is too much and we expect to approve less of this type in the future.
>
> We will approve a reasonable amount of Union business time for on–site Union business as specified in Article 22–4, as possible given the nature of Operations and Maintenance work here at CONDEA Vista, and only with prior approval of each Committeeman's immediate supervisor. (GC Exh. 3)

Daren Appleby responded to Ely by November 5, 1998, letter which included the following:

> I also found interesting, your threats to curtail unpaid Union leave. Historically, unpaid Union leave has always been taken. You have encouraged it by forcing me to take Union leave time for the research I did on the 12 hour shift arbitration preparation as an example. This was per your own suggestion, as you intended on not paying it contrary to Article 22–4. It would be good for our Local Union to be able to cut back on unpaid Union leave, but we believe the company's misconduct when it comes to our CBA is the cause for the so called "too much" time off as you referred to it in your e–mail. Our Union would like to suggest the company take a new and improved approach and cease violating our Collective Bargaining Agreement and bargain in good faith. Not only would our Local Union be able to minimize lost time wages, it really would benefit us all, as we would have better employee relations. (GC Exh. 4)

Jim Ely responded on December 1, 1998, that Appleby's accusations are not specific enough.

Around Christmas 1998 there was a meeting involving Appleby from the Union and Complex Manager Christopher Turner, human resources director Michael Glackin and Jim Ely from Respondent. Turner, Glackin, and Ely recall that Turner brought up a question about a reasonable amount of time for unpaid leave and Appleby responded that he did not have to talk about that issue. Appleby admitted that the issue of unpaid leave came up in one meeting but he did not recall if it was the Christmas meeting. He denied that he refused to discuss excessive unpaid union leave.

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[3] JX 1.

[4] James Ely, Respondent's human resources administrator, testified that a 1990 grievance resulted in use of a "reasonable amount" of paid leave to conduct on–site union business.

[5] Appleby has been the union president since 1997.

[6] James Ely testified, that occasionally requests for unpaid union leave had been denied. Those occasions occurred because of business considerations such as big projects, turnarounds, when units were being worked on and similar situations. On cross–examination it was revealed that Ely had no first-hand knowledge of a specific instance of Respondent denying a request for unpaid leave.

Daren Appleby recalled a February 1999 meeting. Mike Thomas[7] told Appleby that he wanted outlines of specific places and reasons for taking union leave including when meetings were to start and finish.

Respondent notified the Union on February 26, 1999, that,

> Effective March 15, 1999,[8] we will administer Article 22–4 as written. There is no provision in 22–24 for excused time off for Union–related matters off Company property. (GC Exh. 15)

On March 4 Appleby wrote Complex Manager Turner:

> On March 3, 1999, the Union received a letter from Mr. Jim Ely, a copy which is attached, here to, informing the Union that effective March 15, 1999, and then set back to March 22, 1999, Condea Vista will no longer approve a request from the Union for time off to handle Union related matters off company property.
>
> The Union hereby request that you rescind this announcement and that you not proceed with the proposed change
>
> Further, the Union request that you meet and bargain with it as required by NLRB concerning your proposed changes set forth in your February 26, 1999, and March 3 and 4, 1999 correspondence. We are prepared to meet and bargain with you at any reasonable time and place. (GC Exh. 19)

Turner wrote Appleby on March 10:

> . . . .
> Requests for off–site Union matters on scheduled work days for such things as Union conferences, Union training, travel to out–of–town Union meetings, arbitration preparation, Union organizing campaigns, work or meetings at the Union Hall and meetings at Conoco will not be approved as they are not covered by Article 22–4. Requests for time off to attend mutually agreed upon meetings, such as Grievance Meetings with Management on the actual days of arbitration should be addressed in writing to Mr. Jim Ely well ahead of time for approval.
>
> With respect to your alleged demand for bargaining over this "change," no change is being implemented. To the contrary, the Company is simply applying Article 22–4 as written. (GC Exh. 22)

On June 29, 1999, Glackin wrote Appleby and stated that Respondent was willing to negotiate the issue of unpaid union leave.

CONCLUSIONS

Credibility

As to the question of Respondent's policy on leave for union business, in–plant business was handled under article 22–24 of the contract as paid leave. As to unpaid leave away from the plant, Respondent took the position that it had not changed its position regarding leave for union business (GC Exh. 22). However, Respondent's records dispute that point. For example Jim Ely wrote Daren Appleby on October 30, 1998 (GC Exh. 3), and pointed out that Appleby had missed over a third of his scheduled shifts in 1997 and 1998 for union business off the premises. I credit that evidence which shows that Respondent's policy before October 1998 was to grant unpaid leave for union business away from its plant.

I am convinced on the basis of the full record that there was a significant increase in the amount of unpaid leave for union–related business for several months before Respondent changed its policy on unpaid leave. Nevertheless, I find there was no competent evidence showing that unpaid union leave was used for anything other than union business. There was discussion of unpaid leave taken either immediately before or immediately after a weekend, holiday, or vacation. However, it was not shown that that unpaid leave was used for anything other than union business.

There were four different versions of a meeting near Christmas 1998 between Daren Appleby, Christopher Turner, Michael Glackin, and Jim Ely. As shown below, I have considered all that testimony and in consideration of whether Respondent offered to bargain over a change in the unpaid leave policy, I have credited its witnesses.

I have considered the testimony of International Union Representative Gary Beevers that he met with Director of Human Resources Michael Glackin and Jim Ely in April 1999. As shown above, Glackin told Beevers that Respondent suspended unpaid union leave because Daren Appleby was using that leave to prepare untrue union leaflets (GC Exh. 23), and frivolous complaints with the NLRB and numerous data demands. Michael Glackin agreed that he met with Gary Beevers in April 1999. Glackin denied that he told Beevers Respondent had revoked unpaid leave because of union activity or charges with the NLRB. However, notes of that meeting prepared by Glackin (R Exh. 9) tend to support the testimony of Beevers. For example Glackin stated in the meeting notes, "I pointed out the examples of the Union grieves and arbitrates every issue, that they have filed numerous info requests which are frivolous and harassment . . . ." and "I further mentioned a charge that Jim Ely had threatened the lives of Ray Reynolds and his family and then would not allow me to properly investigate the charges, is another example of *the Union* not Mgmt. straining the possibility of establishing a better working relationship" (R Exh. 9). In consideration of their demeanor and the full record, I credit Beevers.

Findings

General Counsel contended that Respondent threatened its employees with reduced leave for union business and changed its policy of granting unpaid leave for union business in violation of section 8(a)(1), (3), and (5). As shown above, Respondent's action in that regard culminated with its February 26, 1999, notice to the Union,

> Effective March 15, 1999,[9] we will administer Article 22–24 as written. There is no provision in 22–24 for ex-

[7] Production manager of the ethylene unit and ethylene storage facility.

[8] Respondent voluntarily reset the March 15 date back to March 22 at the union's request.

[9] Respondent voluntarily reset the March 15 date back to March 22 at the union's request.

cused time off for Union–related matters off Company property. (GC Exh. 15)

In consideration of those allegations, the issues to be determined include whether Respondent had a policy of granting unpaid leave for union business; did Respondent threaten its employees to change that policy; did Respondent actually change that policy without bargaining and did the Union refuse to bargain about a change in the unpaid leave policy.

As to the first issue, I have determined that Respondent's policy before October 1998, was to grant unpaid leave for union business. That privilege was extended to certain union officials including especially the union president. The evidence regarding that practice was substantial. An example of that evidence is an October 30 1998,[10] letter from Respondent Human Resource Administrator Ely to Union President Appleby, which shows that Respondent granted Appleby a substantial amount of unpaid leave for union business during 1997 and 1998. Respondent threatened its employees including Daren Appleby, that it would change that policy and Respondent actually announced a change in that policy on October 30 (GC Exh. 3).

In addition to the above, General Counsel argued that Respondent did not begin discussing changes in its unpaid leave policy until after Appleby and the Union engaged in an increase in protected concerted activities. General Counsel argued that action constitutes a threat and a change of its unpaid union leave policy because of its employees protected union and concerted activities.

In that regard, I shall consider whether General Counsel proved through persuasive evidence, that the Respondent acted out of antiunion animus. *Manno Electric,* 321 NLRB 278, fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, (1982); *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Jim Ely's October 30 letter to Daren Appleby stated that leave time taken offsite by Appleby for union business during 1997 and 1998 was "too much and we expect to approve less of this type in the future." According to Ely, Respondent had granted Appleby unpaid union leave during 1997 and 1998 that exceeded 1/3 of Appleby's scheduled work time.

Appleby and other union officials were engaged in protected activity when handling union business. In consideration of Respondent's motivation, I have considered the testimony of international union representative Gary Beevers that he met with Director of Human Resources Michael Glackin and Jim Ely in April 1999. As shown above, Glackin told Beevers that Respondent suspended unpaid union leave because Daren Appleby was using that leave to prepare untrue union leaflets (GC Exh. 23), and frivolous complaints with the NLRB and numerous data demands. As shown above, I credit Beevers' testimony.

In view of that evidence, I find that Respondent was motivated by its employees' union activities to change its policy of awarding unpaid leave for union business on October 30, 1998. I shall now consider whether Respondent proved that it would have changed its unpaid leave policy in the absence of its employees' protected activity. Respondent raised a question as to whether Appleby was honestly engaged in union business on occasions where unpaid leave coincided with holidays of other time off, but there was nothing in the record that proved that Appleby was not using that time for union business.

Moreover, Respondent contended on numerous occasions that Appleby was using "too much" unpaid leave. However, there was nothing in the record that proved that Appleby's unpaid leave was not required to conduct union business. The Union contended that unpaid leave was necessary due to increased harassment by one of Respondent's supervisors.

Therefore, as to the 8(a)(1) and (3) allegations, I find that Respondent threatened to limit unpaid leave and imposed limitations on unpaid leave, for union business because of its employees' protected union activities and Respondent failed to show that it would have taken that action in the absence of protected union activities.

General Counsel also alleged that Respondent unilaterally changed its unpaid union leave policy in violation of Section 8(a)(5). As shown above, Respondent first threatened to change its policy and announced a change on October 30, 1998. Then, on February 26, 1999, Human Resources Administrator Ely wrote that Respondent would apply the union leave provision of the contract (art. 22–24), as written and there was "no provision in 22–24 for excused time off for union–related matters off company property" (GC Exh. 15). Complex Manager Turner confirmed that Respondent would no longer approve time off for offsite union matters by March 10, 1999 letter to Appleby (GC Exh. 22).

Respondent had a duty to bargain with the Union as its employees' bargaining representative and that duty continued during the existence of its collective-bargaining agreement concerning mandatory subjects of bargaining, which has not been specifically covered in the contract and regarding which the union has not clearly and unmistakably waived its right to bargain. *Rockwell International Corp*., 260 NLRB 1346 (1982), citing *NL Industries,* 220 NLRB 41 (1975); *Southwestern Portland Cement Co.*, 303 NLRB 473, 477 (1991). "An employer has a duty not to change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz*, 369 U.S. 736, 745–747 (1962); *Rocky Mountain Hospital*, 289 NLRB 1347 (1988). As shown above, unpaid leave for union business offsite did constitute a mandatory subject of bargaining.

Respondent claimed that it did not change its leave policy (GC Exh. 22). Instead Complex Manager Turner contended that it was simply applying article 22–24 of its collective-bargaining agreement. That contention is spurious. Respondent's own documents including letters to the Union, show that it had granted unpaid union leave and Respondent contended that union President Appleby had abused its unpaid leave policy by taking too much unpaid leave in 1997 and 1998. (See for example GC Exh. 3 and 15).

Respondent argued that it offered to bargain but that the Union refused to bargain, over unpaid offsite union leave. How-

[10] Find that the question of Respondent continuing to permit unpaid leave to conduct union business did constitute a mandatory subject of bargaining.

ever, there was no evidence that Respondent offered to bargain before Ely's October 30 letter. Ely was responding to a request for unpaid leave from Union President Appleby (GC Exh. 2 and 3). Contrary to Ely's comments, article 22–24 of the collective-bargaining agreement dealt only with paid leave onsite for union business and not with unpaid leave offsite. Nevertheless, Ely pointed out that he had looked at Appleby's 1997 and 1998 unpaid leave after Appleby asked about Respondent's thoughts on article 22–24 of the contract (GC Exh. 3).

Respondent also pointed to a meeting around Christmas 1998, as showing that it offered and the Union refused, to bargain over unpaid leave. As to the Christmas meeting, there is testimony from Daren Appleby, Christopher Turner, Mike Glackin, and Jim Ely. All were at the Christmas meeting. The testimony shows that Complex Manager Christopher Turner was the spokesman for Respondent during that meeting. Turner testified that he told Appleby that the unpaid leave policy was being abused and Appleby responded that Respondent did not have the right to ask him about unpaid union leave.

Appleby recalled that unpaid leave came up in one meeting but he did not recall whether it was the Christmas meeting. Daren Appleby denied that he refused to bargain.

Mike Glackin testified that the Christmas meeting was held to discuss upcoming arbitration and issues at the plant. He testified that Chris Turner raised the issue of excessive unpaid union leave. "Specifically Mr. Turner mentioned to (Appleby) that we had a big issue with the reasonable amount of time being used by the union." "Daren Appleby basically said he refused to discuss it, as I recall" (Tr. 131).

James Ely testified that Turner told Appleby that he was taking an unreasonable amount of unpaid union leave. Appleby testified that Respondent "didn't have a right to talk about that" (Tr. 95).

In consideration of the above evidence, it is apparent that regardless of Ely's testimony about October, and regardless of which version of the Christmas meeting I credit, there is no showing that Respondent offered to bargain about its unpaid leave policy. The testimony of Respondent's witnesses shows that first Ely and then Turner confronted Daren Appleby with the issue of employees, especially Appleby, abusing the union unpaid leave policy.

Its important to look closely at what was involved on those occasions. Clearly, the general issue of unpaid union leave was discussed. However, that issue was brought up in the nature of an accusation of abuse. Appleby was asked to explain why he had taken so much unpaid union leave. During each incident, Respondent appeared to be pursuing a potential disciplinary inquiry. Respondent addressed correction of an abuse rather than a possible change in policy. Since the Christmas meeting was a Union–Management meeting and not a disciplinary action meeting between an employer and an employee, Appleby was correct when he refused to discuss the matter. He was refusing to discuss a personnel action, (i.e., the question of whether he abused the leave policy).

In view of the above evidence, I find that the record failed to prove that Respondent offered to bargain over its unpaid union leave policy. Moreover, I find that the Union did not refuse to bargain over that question.

Respondent also argued in its brief, that even though its practice was to allow unpaid union leave before October 1998, that policy was never an unlimited or unrestricted one. Unpaid union leave was sometimes denied for business reasons. Respondent cited transcript page 100, lines 2–9, in support of its argument. That citation referenced testimony by Jim Ely and Ely admitted on cross–examination, that his knowledge as to that issue was based on what he heard from other supervisors. Ely's testimony does not constitute competent evidence. Therefore, there was no competent evidence supporting Respondent's argument. The record failed to establish that unpaid union leave was sometimes denied for business reasons. Moreover, even if unpaid leave had been occasionally denied for business reasons, the record shows that was not the case in October, February, or March. Instead, on those occasions, Respondent raised only the issue of abuse in consideration of its unpaid offsite leave policy. The question of denying unpaid leave for business reasons never surfaced during the incidents material to this proceeding.

Respondent argued that the record showed that union officials had abused the unpaid leave policy. If I assume for the sake of discussion that Respondent was confronted with abuse of its policy when it reviewed Appleby's record in October, it is apparent that Respondent had several options that it could have legally pursued regarding possible abuse of leave. One option may have involved negotiations with the Union. I am convinced on the basis of the full record, that Respondent did not elect to pursue a legal option. Instead Respondent elected to change its policy without negotiations.

Nevertheless, I shall consider Respondent's contention that its policy was abused in determining whether there is an exception to its duty to bargain before making a unilateral change. In cases involving contract negotiations, the Board has found exceptions to an employer's duty to refrain from unilateral changes in mandatory subjects, until an impasse is reached, to include (1) when a union engages in bargaining delay tactics and (2) when economic exigencies compel prompt action. *Vincent Industrial Plastics, Inc*., 328 NLRB 300 (1999); *Bottom Line Enterprises*, 302 NLRB 373 (1991); see also *International Paper Co.*, 319 NLRB 1253, 1273, 1274 (1995). Here, of course, the parties were not engaged in contract negotiations. Additionally, as shown herein I find that the Union did not refuse to bargain over the unpaid leave question and there was no evidence showing that the Union engaged in delay tactics. As to economic exigencies issue, Respondent contended that it first learned of Daren Appleby's abuse of unpaid union leave after Appleby grieved that he had not received sufficient training (Tr. 120–123), but there was no evidence showing that unpaid leave placed Respondent in a position where unilateral action was necessary because of economic exigencies. Therefore, I find that Respondent was not justified in changing its unpaid leave policy as an exception to its duty to bargain.

In February 1999, Respondent Supervisors Jim Lewing and Mike Thomas met with Appleby and asked him to specify places or events for taking union leave (Tr. 35). On February 26 Jim Ely wrote a "follow–up" to his October 30, 1998 letter, and announced that Respondent's new policy on unpaid union leave would be effective March 15, 1999 (GC Exh. 15).

Subsequently, according to Human Resources director Glackin, the Union consistently took the position that it would agree to only unlimited unpaid union leave (Tr. 135). Perhaps Glackin is correct in that testimony. However, the Board has refused to find a violation on a party taking an adamant position on an issue *International Paper Co.* supra. Moreover, Respondent did not put the Union to the test in that regard. It did not offer to negotiate about its change in policy and the Union's resistance to that change even to the point of insisting on return to the status quo before October 1998, does not constitute a refusal to bargain.

I find that Respondent unlawfully changed its pre–October 1998 policy of granting unpaid offsite union leave before giving the Union an opportunity to bargain in violation of section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Condea Vista Company, Lake Charles Chemical Complex, is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act.

2. Paper, Allied Industrial, Chemical & Energy Workers International Union, Local Union No. 4–555, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act by threatening to change and changing, its policy of granting unlimited unpaid leave to conduct union business outside the plant because of its employees' protected activities. Employees in the following appropriate bargaining unit are exclusively represented by Paper, Allied Industrial, Chemical & Energy Workers International Union, Local Union No. 4–555:

> All employees of CONDEA Vista Company's, Lake Charles East Plant, except and excluding all executives, division heads, office clerical employees, warehouse issuemen, chemists, engineers working in their professional capacity, safety supervisors, technicians, inspectors, fire marshals, salaried warehousemen, guards and watchmen, professional employees, foreman, [sic] and all other supervisor [sic] employees as defined in the Act.

4. Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by changing its policy of granting unlimited unpaid leave to conduct union business outside the plant without first bargaining with the Union during the term of its collective-bargaining agreement.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent employers have engaged in unfair labor practices, I shall recommend that each be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally changed its policy of granting unlimited unpaid leave to conduct union business outside the plant, I shall order Respondent to restore that policy to the status quo ante.

[Recommended Order omitted from publication]